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Supreme Court of the United States

OCTOBER TERM, 1917

No. [redacted]53

NORTH PACIFIC STEAMSHIP COMPANY,
Appellant,

vs.

HALL BROTHERS MARINE RAILWAY AND SHIPBUILDING COMPANY,
Appellee.

BRIEF FOR APPELLANT.

FRANK W. AITKEN,
H. W. GLENSOR,
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Proctors for Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1917

No. 301

NORTH PACIFIC STEAMSHIP COMPANY,
Appellant,

vs.

HALL BROTHERS MARINE RAILWAY AND SHIPBUILDING COMPANY,
Appellee.

BRIEF FOR APPELLANT.

I.

Statement of Case.

This is a direct appeal from a decree of the District Court of the United States for the Northern District of California sustaining appellee's libel in admiralty. The appeal is based upon the ground that the District Court was without jurisdiction in admiralty to hear or determine the cause by reason of the fact that the subject-matter thereof was not maritime, and consequently that

the court erred (1) in so hearing and determining said cause, (2) in rendering said decree, (3) in denying appellant's petition to arrest and vacate said decree and to dismiss said cause, and (4) in not dismissing it.

The decision of the District Court is squarely opposed to the reasoning of this court in similar cases; and in view of the fact that it extends admiralty law and procedure to a class of contracts which are not maritime in their nature or subject-matter, and which are of large and ever increasing importance, it becomes a matter of great moment that this court review the ruling of the District Court and determine the question itself. It has not been directly decided by this court heretofore.

The facts in the case are briefly as follows: Libelant, Hall Brothers Marine Railway and Shipbuilding Company, a California corporation, and appellant, North Pacific Steamship Company, also a California corporation, made a parol contract or agreement whereby libelant was to turn over to appellant its marine railway, shipyard, equipment, supplies and laborers for a period of time sufficient to enable *appellant* to repair its vessel, the "Yucatan". In consideration therefor appellant agreed to make payments in accordance with a certain schedule, a copy of which is set forth as Exhibit "A" to the amended libel (Tr. pp. 10-11). This schedule is not the contract. It is a memorandum only of the rates to be charged. The contract itself rested in parol (p. 78, f. 66; p. 100, f. 97).

Under this contract or agreement appellant took possession of libelant's marine railway and shipyard, and used its equipment, supplies and laborers and *itself* overhauled and repaired the "Yucatan". Appellant paid all bills presented to it in accordance with said schedule, except two. It objected to certain sums charged in these two for rental of the marine railway for certain overtime, and refused to pay the amounts so charged. Libelant thereupon sued to recover the disputed amount, namely, $2533.45, alleging the contract for the payment of some $29,000 more or less and that said sum of $2533.45 remained unpaid thereon.

The contention between the parties is as to whether the contract is one which brings the case within the admiralty jurisdiction of the District Court—whether it is for the use of a shipyard or for work on a ship.

In the lower court the appellant contended that the contract was one solely for the use by appellant of libelant's marine railway, shipyard, equipment and laborers in such manner as appellant might choose to employ them. Libelant contended that the contract was one for repairs to be made *by it* to the "Yucatan". Upon the construction of the agreement depends the determination of this appeal.

There was no written agreement between the parties except the schedule of prices in evidence as Exhibit A (Tr. p. 10, f. 16). This schedule is obviously only a memorandum of some of the terms

of the agreement or "oral understanding" which had been reached previously by Mr. Hubbard and Mr. Doe (p. 78, f. 66). It does not purport to be a complete contract; for instance, it does not state who is to make the repairs or indicate in any way what the repairs are. It specifies the price to be paid for the use of the marine railway—a per diem charge for each "lay day" on which work is done; it also gives a price for water and for the use of hammers, riveters, lathes, etc. It provides that material will be supplied at a certain percentage above cost, and similarly as to all necessary labor "used in repairing the vessel". It does *not* provide for the doing of any repair *work* by libelant, either in accordance with plans, or orders, or requirements, or otherwise.

That the work is to be done by the ship owner, the appellant, and not by the yard-owner, the libelant, clearly appears from the provision as to overtime dockage, which states that the per diem "lay day" charge "contemplates *allowing work to be carried on*" during the usual eight-hour day, and continues:

> "In case *you desire to work over time* the same lay day rates will apply."

Under this agreement appellant made repairs to its ship and libelant rendered it bills covering dockage, labor, use of equipment, and materials "sold to" the ship and its owners, but never for *work done* or *repairs made*.

The only items unpaid were two charges for the use of the marine railway for certain periods of overtime, charged under the above-quoted provision. These charges, which are clearly for rent for the use of the railway as a part of the yard, are the items for the collection of which (as an unpaid balance of the contract price as a whole) this libel was filed.

The writing (Exhibit A) is not a complete or definite statement of the contract of the parties. It therefore becomes necessary that the court particularly consider and clearly analyze the following testimony, which deals with the nature of the contract and the subject-matter of this action. Whatever doubt there may have been as to the nature of the contract was removed by the testimony of the men who made it.

John L. Hubbard, libelant's manager, described the contract in the following language (Tr. pp. 81, 91, 95, 96):*

> "Q. Did you give any estimate on how long it would take to make those repairs?
>
> A. I did not; in fact I was not doing the repairs. Mr. Cave was *doing the repairs himself*. We only *furnished* the dock and air and equipment and such men as they required of us." (Tr. p. 81, f. 71.)
>
> * * * * * * *
>
> "Q. Mr. Hubbard, you remember this contract which is in evidence here; I want to ask you if that is the ordinary character of contract which your corporation generally entered into?

*Italics in quotations are supplied by us, throughout.

A. Yes, it is. Some features of it are a little out of the ordinary.

Q. Do you generally do the work yourself, or not?

A. That is where this differs from the usual contract.

Q. That is what I mean: In what way does it differ?

A. It was intended to cover a condition where the *owners were to do and to supervise the work themselves, and we were to furnish the use of the dock* and the equipment and the men at a certain stipulated price, and the material."

* * * * * * *

"Q. You said that in the ordinary contract you had for repairing a vessel there, there is a provision that if you do not repair her within a certain time you will have to pay demurrage: Is that true?

A. Yes, that largely prevails.

Q. There was no such agreement in this case, was there?

A. No, sir, *we were not repairing the vessel.*"

* * * * * *

"Q. How did it happen in this case that they did their own supervising?

A. That is what Mr. Doe wanted. *He did not want us to undertake the job.* We were not asked to give an estimate as to what it would cost or anything of that kind; *he wanted to do it himself.*"

And Charles P. Doe, appellant's president and general manager testified as follows, referring to his conversation with Mr. Hubbard (Tr. pp. 100, 101, 102):

"He wanted to know when we wanted to go on and what we were going to do. I gave him a

brief outline of it. He said he could take her on. I said, 'All right'.

We had a general conversation as to what the steamer was going to do and the character of the repairs to be made and the conditions under which *we wanted to make them.*"

"Q. In that conversation was anything said as to the details of the conditions which you mentioned? You said you had a conversation with reference to general conditions under which the vessel was to be placed there: What did you refer to by that?

A. The amount of repairs, and who was to make them, and the system under which we wanted to make them; in other words, *we did not want him as a dock-yard man to make the repairs, we proposed to do those ourselves. We wanted to use his facilities.*" (Tr. pp. 100-101, ff. 97-98.)

* * * * * * *

"Q. In either of those conversations, was anything said with reference to the character of the tools, and the accommodations, and so forth, to be furnished for the repair of the 'Yucatan' while at that dock?

A. Yes. It was understood at all times that *we were to go in and use the yard* practically as if we owned it, other than the fact that he wanted to finish up the 'Archer' before the 'Yucatan' was docked. After that, we were to have the use of all the equipment he had."

And Mr. Cave, appellant's superintending engineer, had the same understanding of the contract (Tr. p. 112):

"Q. With reference to the equipment and the use of the dock, was anything said with reference to what part of the equipment should be used by the 'Yucatan'?

A. Well, as I understood it, all of it, anything they had in the yard. *We paid them for*

the privilege of going to the yard and using their tools absolutely."

The above is the testimony of the men who made the contract, and there is apparently no dispute between them as to its nature. They considered it purely as a contract for the supplying of a marine railway, shipyard and equipment, but calling for the performance by libelant of no service whatsoever on or for a ship. The dispute was between counsel as to whether the contract, as so understood between the parties, was of a maritime nature or not. Appellant contended it was not, and therefore not within the admiralty and maritime jurisdiction of the United States or of the District Court.

The court, however, was of the opposite opinion and rendered its decree in favor of libelant for the amount demanded, and denied appellant's petition to arrest and vacate said decree and to dismiss said libel, which was made upon the ground that the subject-matter of the libel was not within the maritime jurisdiction of the United States or the court.

Hence this appeal.

II.

Errors Assigned and Relied Upon.

(1) The court erred in hearing and determining said suit; which error results from the fact that

the said subject-matter of said suit is not within the admiralty and maritime jurisdiction of the United States, but is concerned exclusively with a contract, the subject-matter of which is not maritime.

(2) The court erred in its decision implied in its decree that the said subject-matter of said suit is maritime, and is within the admiralty and maritime jurisdiction of the United States.

(3) The court erred in denying appellant's petition to arrest and vacate its decree and to dismiss said cause, which petition was presented on the ground that the said subject-matter of said cause is not maritime and was not within the admiralty and maritime jurisdiction of the United States or said court.

(4) The court erred in not dismissing the libel; which error results from the fact that the said subject-matter of said cause was not maritime, and consequently was not within the admiralty and maritime jurisdiction of the United States or said court.

Tr. p. 136.

III.

Brief of Argument.

We shall present our argument in this brief along the following lines:

The contract was not maritime as to its subject-matter. This appears from the written memorandum and more particularly from the testimony as to the actual contract.

As the nature of the subject-matter is the proper test of admiralty jurisdiction, this is not an admiralty case.

Admiralty cannot take jurisdiction here on the ground that some severable part of the contract was maritime, because the libel was filed on the contract as an entirety and because if the items can be segregated it appears that the only item in controversy is distinctly non-maritime—a per diem rental, for a resting-place on land, for a ship which was being repaired by its owners.

The Act of June 23, 1910, does not give the court jurisdiction, as Congress cannot extend the jurisdiction of admiralty and also because the Act itself does not purport to give remedies in personam.

THE SUBJECT-MATTER OF THE CONTRACT WAS NOT MARITIME.

Jurisdiction in admiralty depends on the subject-matter and not on the ultimate object or purpose of the contract.

We urge the court particularly to consider the nature of the contract and the fact that the parties themselves are in agreement in that regard, for

upon the nature of the contract depends the solution of the problem and the determination of this appeal.

The Shop and Yard, as a Whole, Was the Subject-Matter.

The subject-matter of the contract was the ship yard, which appellant hired as a whole—including machine shop and marine railway—for the purpose of making repairs to its ship itself. Appellant did not bargain for making repairs or for the *results* of the use of the equipment, labor and materials supplied by libelant, but for the *use* thereof by itself. This appears both from the writing, Exhibit A, and from the oral testimony.

The court will note that the memorandum was not the usual form of contract whereby a shipbuilding company agrees to repair a ship. It did not call for the performance by libelant of any service on or for a ship, either on water or land. It called merely for the supply of a shipyard, nothing more. That constituted its subject-matter. In other words, appellant agreed to pay a stipulated price for the use of a shipyard and equipment, a subject-matter having nothing to do with ships or shipping. As was well said by Mr. Cave, appellant contracted for "the privilege of going to their yard and using their tools"; and the *privilege of using* the tools of a ship yard—lathes, drill-presses, punches, etc., and also the ship railway—is not maritime.

The court will recall the testimony of Mr. Hubbard, Mr. Doe and Mr. Cave heretofore set out. Each of them testified that it was not the usual form of contract; that libelant merely furnished its yard

and equipment at a stipulated price, that it had nothing whatsoever to do with making repairs, but on the other hand, that appellant took over the yard and equipment practically as if it owned it and made the repairs itself.

As libelant's manager Mr. Hubbard testified (Tr. p. 91, f. 85) libelant's usual or general contract is quite different in that specifications are usually made up "stipulating what the character of the repairs are on the vessel". There is nothing of that sort in Exhibit A—not even a *general* statement as to what repairs are to be made.

But if Exhibit A could be considered the contract itself, it would still be so incomplete as to require interpretation; and the parties have supplemented it by their testimony as to what their interpretation of it was, and what they did under it.

Counsel for libelant claims that the subject-matter of the contract was repairs to be made by it to appellant's vessel, and that Exhibit A supports such claim. The facts and the law are otherwise. Exhibit A is not the contract itself; it is evidence of certain terms of the contract. It is in fact a schedule of charges for use of the marine railway, equipment, laborers, etc. It is absolutely silent as to who was to make repairs or what repairs were to be made; it contains none of the usual provisions of a complete contract even for the use of a yard. The real contract, as referred to in Mr. Hubbard's and Mr. Doe's testimony, rested in parol. The memorandum is incomplete, and the parties have

supplemented it by their testimony. They have testified what the contract was, and what they did under it. It is not within the province of counsel to contend that they misconstrued it, particularly with respect to matters upon which the writing is silent. As the California Supreme Court has said:

> "Parties to a contract have a right to place such an interpretation upon its terms as they see fit, even when such an interpretation is apparently contrary to the ordinary meaning of its provisions. And in all cases where the terms of their contract, or the language they employ, raises a question of doubtful construction, and it appears that the parties themselves have practically interpreted their contract, the courts will follow that practical construction."
>
> *Mitau v. Roddan*, 149 Cal., at 14.

The conduct of the parties also shows what the contract was.

As was well said upon one occasion by Lord Chancellor Sugden, show me what the parties have done under a contract and I will tell you what that contract means.

> *Attorney General v. Drummond*, 1 Dr. & W. (Irish Ch.) 353.

See also *Brooklyn Life Insurance Co. v. Dutcher*, 95 U. S. 269, to the effect that

> "there is no surer way to find out what parties meant, than to see what they have done".

What was done is plain and convincing: appellant used the plant and made the repairs; libelant

rendered bill for dockage, etc., but never for making repairs.

Neither the writing, the testimony as to the making of the contract, nor the acts of the parties show a maritime subject-matter.

The Subject-Matter, the Yard, Distinguished from the Object, Repairs.

The subject-matter, we have pointed out, was the plant and equipment which appellant contracted to use, and used, in repairing its ship. The *repairs* were not the subject-matter of any contract; making its repairs itself, it made no contract for them.

The *object* of the contract on the other hand was the repair of the ship; and with this the libelant had no concern. The appellant's superintendent was in sole charge of repairs. It was no concern of libelant what repairs were made, or how they were made or who made them. Its only concern was that appellant pay for the use of the shipyard. That was the subject-matter of the contract as distinguished from the object which appellant had in mind in entering into it.

Assume that instead of having entered into this contract for an uncertain period, the appellant had leased the shipyard for a year or two years, or had purchased it, or had purchased a piece of ground upon which to build a shipyard of its own, in each case the ultimate object being the repair of ships. In none of the above instances would the subject-matter have anything to do with a ship.

nor could it be made the basis of a libel in an admiralty court for the recovery of the agreed rental or purchase price of the yard or of the bare land. And yet that is the identical situation in the present case. The claim of libelant is solely for use and occupation of its yard.

The object of the contract is immaterial; it is the subject which is controlling.

As was said by Justice Woodbury in *Leland v. Ship Medora,* 15 Fed. Cases No. 8237, at page 303:

> "Admiralty jurisdiction in contracts relates to subject-matter * * * this means subject-matter of the contract, that is, *the thing to be done* being maritime, and *not the object of a contract,* as a ship."

See also:

The Paola R, 32 Fed. 174.

The *thing to be done* in this case was for the libelant to turn over to appellant its shipyard. The *object of the contract* was to enable appellant to make repairs to its vessel.

THE SUBJECT-MATTER OF A CONTRACT, NOT THE OBJECT, IS THE TEST OF ADMIRALTY JURISDICTION.

In admiralty, subject-matter has come to be the test of jurisdiction over contracts. In the beginning location was held to be the criterion, and it was strictly applied. Then followed a reaction against the strict doctrine of location and the swing of

the pendulum in the opposite direction has brought in the rule of subject-matter as the test of jurisdiction. As expressed by Justice Story, admiralty jurisdiction over contracts

> "extends over all contracts, wheresoever they may be made or executed, or whatsoever may be the form of the stipulations, which relate to *navigation, business or commerce of the sea*".
>
> *De Lovio v. Boit*, 7 Fed. Cases No. 3776.

But this court, in finally adopting the subject-matter of the contract as the test of jurisdiction, clearly indicated that no contract could satisfy the test unless it covered "maritime service or maritime transactions".

> *Insurance Co. v. Dunham*, 11 Wall. 1, 26.

Again we find the rule fairly stated by this court as follows:

> "The jurisdiction * * * depends, in cases of contract, upon the nature of the contract, and is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation."
>
> *The Eclipse*, 135 U. S. 599, 608.

See also:

> *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52.

The rule as to the subject-matter being the test is plain enough. But some cases (relied on by libelant) seem to indicate that it does not apply to ship railways, or rather that such structures are maritime in purpose, and that therefore contracts con-

cerning them are with admiralty. But a mere incidental connection with shipping does not make a subject of maritime.

In accepting subject-matter as the test, it must be applied guardedly. The reaction against the old criterion of location was so sharp that certain judges in applying the subject-matter test, applied it very carelessly, so as to include any contract which either nearly or *remotely* related to a ship or shipping, irrespective of whether or not the precise subject-matter of the contract was concerned with "navigation, business or commerce of the sea". In other words, these judges failed to clearly distinguish the *object* of the contract from the *subject-matter.* They were too eager to throw aside the doctrine of location in all cases, and this even despite the fact that the Supreme Court had refused to do away with it entirely as an aid in determining jurisdiction. For example: location is still retained as a factor in the rule of the Supreme Court that a ship-building contract and a contract for furnishing equipment and supplies to a new vessel are essentially and exclusively within the jurisdiction of the common law courts.

People's Ferry Co. v. Beers, 20 How. 393;
Roach v. Chapman, 22 How. 129;
The Winnebago, 205 U. S. 354.

A reference to the cases relied upon by libelant will serve to illustrate the manner in which the question has been dealt with and the failure in

certain instances properly to distinguish between the subject-matter and the object of a contract.

Wortman v. Griffith; The Vidal Sala.

Thus we have the case of *Wortman v. Griffith,* 30 Fed. Cases No. 18,057, decided in 1856, opinion by Justice Nelson, which is chiefly relied upon by libelant. To a certain extent that case shows the effect of the reaction above referred to and *seems* to hold that the use of a maritime railway is maritime because connected indirectly with shipping; properly understood, however, it does not so hold and is quite different from the present case and not applicable here.

Mr. Justice Nelson states that the nature of the contract or service and not the question whether the contract is made, or the service is rendered, on the land or on the water, is the proper test in determining whether admiralty has or has not jurisdiction. But in applying the rule to the facts he held that the subject-matter of the contract in that case was maritime. In doing so he was in part influenced by the reaction against the location doctrine, and in part justified by the particular fact of that case, which differed essentially from the case at bar.

In the Wortman case it appeared that the vessel had been hauled up, and held, on libelant's railway, while she was under repair "by other shipmasters". The only point passed on by the court was whether there was a proper distinction between the case

where the yard-owner makes repairs himself and that where they are made by others. That case, unlike the present case, involved *a contract for repairs* (made by the ship owner with another party), and the decision was simply that it was immaterial whether such contract for repairs was made with the yard-owner or with a third party. The decision says:

> "There can be no doubt that in cases where the shipmaster owning the ship yard and apparatus is employed to make the repairs, the service in question enters into and becomes part of the contract and is thus the appropriate subject of admiralty jurisdiction."

And

> "Although a distinction may be made between this case, in the aspect presented, and in the case where the shipmaster is employed to make the repairs, I am inclined to think that it is not a substantial one."

As stated in *The Vidal Sala* (12 Fed. 207):

> "The court upheld the jurisdiction and decided that the owner of the railway cradle could sue in the admiralty, although the repairs were made by other parties."

But in this case there was no contract for repairs, either with the yard-owner or "other parties". Nor was this really a case of a contract for service in connection with a marine railway as the Wortman case was considered to be. The contract here was essentially for the use of the ship yard and equipment as a whole, including as parts thereof a

machine shop and a marine railway; in fact it might well be said that the essential thing was the use of the machine shop for actually making the repairs and that the use of the railway was incidental to it. And both as to the machine-shop and as to the railway, the contract was only for the hiring thereof (so as to permit use by the shipowner himself) and not for the making of repairs or rendering of any service by another.

That a contract for such hiring, even of a marine railway, is not within the contemplation of the Wortman decision appears from the decision itself:

> "The doubt I have had in the case is upon the objection raised to the jurisdiction of the court. It is claimed by counsel for respondents that the agreement for the service rendered is to be regarded simply as a hiring of the yard and apparatus; and *certainly if this be the true character of the transaction there would be great difficulty in upholding the jurisdiction.*"

In other words Judge Nelson recognized in the Wortman case the true rule that the hiring of the ship yard and apparatus would not be within admiralty jurisdiction, but refused to apply it to that case inasmuch as the use of the yard there was not by way of hiring, but in connection with an actual contract for repairs—a state of facts which does not exist in the present case.

So far as the Wortman decision suggests that the use of the marine railway is in itself of a maritime nature and within admiralty jurisdiction, it is an

instance of the improper application of the proper test (that of subject-matter), by the confusion of the subject-matter of the contract with its object or purpose. The subject-matter of the contract was the marine railway, which is not maritime in nature or use; the object (to facilitate making of repairs to a vessel) was the only thing that could properly be considered maritime. In so far as the case seems to so suggest that the use of the railway for ship repairs is a maritime transaction Judge Nelson ignored his own decision of a few years previous in the case of *Ransom v. Mayo,* 20 Fed. case No. 11,571, wherein the syllabus is as follows:

> "Where a contract was made upon land, between the owner of a vessel and a shipbuilder for her repair by the latter in his shipyard on the land. Held neither the contract nor the service is maritime."

He also failed to consider other cases of the same import and effect as his own decision in the Ransom case, notably the following:

Bradley v. Bolles, 3 Fed. Cases No. 1773, wherein it was held that work done upon a vessel in a dry dock, in scraping her bottom preparatory to coppering her, was not of a maritime character.

Pritchard v. Lady Horatia, 19 Fed. Cases No. 11,438, wherein Judge Hopkinson, a noted admiralty jurist, held that where a contract for repairs was made on land, and the owners were represented on the spot by a consignee with funds, a plea to the jurisdiction of the court of admiralty must avail.

Also *Ransom v. Mayo,* 20 Fed. Cases No. 11,571 A, the decision in the District Court by Judge Betts, a learned admiralty jurist and author of Betts Admiralty Practice.

See also:

Boon v. The Hornet, 3 Fed. Cases No. 1640.

The same criticism applies to the case of *The Vidal Sala,* 12 Fed. 207, also relied upon by libelant. The decision was on the ground that libelant actually rendered services in the repair of a ship, while in dry dock. The contract there was clearly for services—docking and raising the steamer, and also clearing the dock of water and keeping it clear while the vessel was undergoing repairs.

The decision was also based on the ground that a dry dock is analagous to a wharf and to other docks, whether it be the slip-dock or the wet-dock where vessels are kept afloat at low water; and the court particularly pointed out that when a vessel enters a dry dock "she floats in, and when she leaves it she floats out". There is certainly nothing in this reasoning that applies to the case of a ship hauled up on a railway on land.

While these two cases—*Wortman v. Griffith* and *The Vidal Sala*—seem at first glance to uphold libelant's contention that there is something maritime about the use of a ship railway, it will be noted that when more carefully examined neither of them really does uphold it, and neither of them is similar to this case, or applicable here. On the other hand,

the other cases mentioned above—particularly *Ransom v. Mayo* (two decisions)—are strictly in point that a marine railway, on land, is not a subject-matter of admiralty jurisdiction.

We do not claim that admiralty may not have jurisdiction of claims for repairs made to a ship by a libelant, at least while the vessel is in the water. What we do claim is that admiralty has not jurisdiction of a suit on a contract for furnishing a marine railway, shipyard and equipment, though the object may be repairs to a ship by the shipowner. It is our contention that such is the nature of the present contract.

The Robert W. Parsons, 191 U. S. 17.

We have already discussed the testimony of the parties and shown that the contract in this case was one for the supply of a marine railway, shipyard and equipment; that the libelant was not required to and did not make any repairs, but that on the contrary, they were made by appellant.

We have also discussed the rule that subject-matter is the test of maritime jurisdiction and that subject-matter must not be confused with the object of the contract, as has been the case in some instances. We have also alluded to the fact that this court has not entirely done away with the old test of location.

We now proceed to a consideration of the case of *The Robert W. Parsons*, 191 U. S. 17 (wherein the doctrine of location was still recognized as a

factor), and to show that that case not only provides the nearest available approach to a solution of this problem, but also that it solves it in favor of the contention of appellant.

That case involved a contract for repairs to a ship in a dry dock, and it was there held that admiralty had jurisdiction. The court was divided, however, five to four, Chief Justice Fuller, Justices Brewer, Peckham and Harlan dissenting. The prevailing opinion (by Justice Brown) was upon the theory that repairs to the ship by libelant, though made while the ship was in dry dock, were nevertheless made on the water and not on land, that the dry dock was really a part of the sea.

In the course of the opinion, however, Justice Brown said:

> "for incidental repairs made on land to articles of a ship's furniture or machinery, it has never been supposed that a court of admiralty had jurisdiction." (191 U. S. 32.)
>
> "*Had the vessel been hauled up by ways upon the land and there repaired, a different question might have been presented,* as to which we express no opinion." (191 U. S. 34.)
>
> "There is no doubt of the proposition that a *dry dock itself* is not a subject of salvage service *or of admiralty jurisdiction*, because it is not used for the purpose of navigation. That was settled in Cope v. Vallette Dry Dock Co., 119 U. S. 625."

Thus at as late a date as 1903 we find the justices of this court divided five to four upon the question of extending admiralty jurisdiction to a case

involving repairs made by libelant to a vessel in dry dock, both the prevailing and dissenting opinions, however, demonstrating that the test of location is not to be entirely disregarded. But what is more to the point, in considering the facts of the present case, we find clear statements in the prevailing opinion itself that admiralty jurisdiction should not be extended to a case where repairs are made to a vessel which is hauled up by ways upon the land, and further that a dry dock itself is not a subject of admiralty jurisdiction. The discussion of the matter in the opinion shows beyond doubt that the reason for holding a dry dock to be within admiralty cannot apply to a marine railway, those reasons, as stated in the opinion, being simply that a harbor dock is an artificial basin constructed in connection with a harbor and used in loading and discharging cargoes, and that a dry dock differs only in being smaller and provided with machinery for pumping out the water. It is in concluding this discussion that Justice Brown says that repairs in a dry dock are not to be considered as made on land, and that if the vessel had been hauled up by ways upon the land and there repaired a different question would be presented.

It is upon the above opinion of Justice Brown, which is based upon reason and authority, that appellant contends that admiralty has no jurisdiction of the subject-matter of the present case. Either one or the other of the grounds stated is sufficient for our purposes, but the facts of the present case bring it within the operation of both.

In the first place the marine railway and shipyard of libelant was not, like a dry dock, in any sense a part of the sea. It was situate wholly upon the land, and the vessel was *"hauled up by ways upon the land* and there repaired". In this regard the attention of the court is called to the photo plate of the "Yucatan" while she was undergoing repairs (Tr. p. 133). If, therefore, repairs to the machinery of a vessel, that is, its engine, boilers, shaft, etc., made on land, "have never been supposed to be subject to admiralty jurisdiction", it is no more proper to give admiralty jurisdiction, where the vessel itself is hauled up on the land and repairs are there made either to the machinery or to the decks, masts, or other stationary parts of the vessel. In each case the contract is one wholly performed on land, and though having ultimate relation to navigation, it is not directly connected with navigation, business or commerce of the sea. We claim there is no distinction between the two cases.

In the second place, in this case (unlike the Parsons) the subject-matter was the railway *itself*, and if "a *dry dock* is not a subject of salvage service *or of admiralty jurisdiction*", even though held to be a part of the sea, *far less so is a marine railway* and shipyard, situate wholly upon the land. Both, it is true, are used for the repair of ships (that is their object); but neither can be "used for the purpose of navigation". The railway was the exclusive subject-matter here. Libelant was

under no duty, by contract or otherwise, to make repairs, or to perform any service whatsoever except to supply its marine railway, shipyard and equipment. Libelant was entitled to payments for the use of the railway and yards, regardless of whether or not appellant made any repairs at all. The subject-matter of the contract was the supplying of the plant; and that subject-matter is certainly not within admiralty jurisdiction, under the above opinion.

The court will bear in mind that the claim in this case is solely for charges claimed to be due for overtime for the *use and occupation* by appellant of libelant's marine railway and shipyard. That is the subject-matter, and if subject-matter is to be the test of jurisdiction, under the foregoing authorities cited, admiralty is without jurisdiction in this case. No other conclusion is justified.

ADMIRALTY CANNOT TAKE JURISDICTION OF ANY SEPARATE PORTION OF THIS CONTRACT.

And it might be argued that the libel here was proper because some *portion* of the contract was maritime. However, for admiralty jurisdiction the contract must be maritime as a whole; and even if this were not so the contract here could not be severed inasmuch as the libel was brought on the contract as an entirety; furthermore, if there could be any such segregation of items there would be no jurisdiction in admiralty inasmuch as the only

items in dispute—for overtime rent—are not maritime at all.

Even were there any maritime element in the contract here involved, and we claim that there was not, nevertheless, to give admiralty jurisdiction, the contract must be maritime in *all* its elements. This is the rule laid down by Justice Story in *Plummer v. Webb*, 19 Fed. Cases No. 11,233, as follows:

> "In order that a contract be cognizable in admiralty it must be maritime in all its elements; the substance of the whole contract must be maritime; in cases of a mixed nature, it is not sufficient that there are involved some ingredients of a maritime nature; jurisdiction of those cases belongs to the common law courts."

To the same effect:

> "Where a party seeks the aid of a court of admiralty to enforce a special contract, the entire contract must be essentially maritime in its qualities and attributes. It is not sufficient ground for admiralty jurisdiction that the contract involves some elements of a maritime nature. The substance of the whole contract must be maritime. And a maritime privilege or lien, imparting, as it does, a tacit hypothecation of the subject of it, is a strict right and cannot be extended by construction, analogy, or inference."
>
> *The Vidal Sala*, 12 Fed. at 208.

It must be perfectly clear here that the contract is not maritime in all its elements, or in its essence. Appellant contracted for the use of libelant's various machine shop tools—mentioned in Ex-

hibit A and including lathes, drill-presses, etc.—constituting, apparently (and on the evidence) a complete machine shop. This part of the subject-matter was not maritime at all, unless made so by the fact that appellant intended to repair a ship; but such intention or purpose or object is not the test of admiralty jurisdiction.

But even if libelant had any right to segregate the items of the contract and proceed in admiralty as to some of them, it has not done so in this case. The libel (Tr. pp. 2-3) alleges the making of the contract called for the payment of $29,411.25, and that a balance of $2,533.45 remained unpaid. If libelant's contract for the $29,411.25 is not maritime (we contend it is not), jurisdiction of the libel based upon it would not be conferred by the fact that a different libel might have been filed alleging a different contract.

Finally if the items here could be segregated it would not help libelant in any way as the only items in controversy are not concerned at all with services, labor, material or use of machinery or tools in making repairs, but are solely for the use and occupation of the marine railway after the ship was placed upon it. In this respect the case is entirely different from *Wortman v. Griffith* as already pointed out. There libelant's claim was considered one for services in hauling up and holding up the ship, in connection with the work of another party under a contract for repairs; here the claim in dispute is not for services at all in

connection with the railway but for *"the use of same"*, and is not in connection with any contract for repairs by any one. Such a claim has no maritime elements at all.

See also:

Berton v. Dry Dock Co., 219 Fed. 763, 769.

THE ACT OF CONGRESS OF JUNE 23, 1910, DOES NOT CONFER ADMIRALTY JURISDICTION OVER THIS CASE.

In the District Court libelant made the argument that admiralty jurisdiction of this case was conferred by the Act of Congress of June 23, 1910. Aside from the fact that the Act does not purport to and in fact does not cover the case of repairs being made by the shipowner himself wholly upon the land, appellant contends that Congress is without authority to extend admiralty jurisdiction to any case not properly within admiralty jurisdiction as defined by this court.

The judicial branch of our Government is supreme in determining the extent of its admiralty and maritime jurisdiction, and Congress has no more power to extend it than a State legislature to restrict it. Admiralty jurisdiction is granted to the federal courts by the federal constitution, and it is for those courts to interpret and define its scope. Any attempt by Congress to overrule a decision of this court defining the limits of that jurisdiction is nugatory. For example, it is the

uniform holding of this court that a contract to build a ship is not maritime. Has Congress any power then to take jurisdiction of such a contract from the State courts and confer it upon the federal courts? Obviously not.

In referring to admiralty jurisdiction Mr. Chief Justice Taney, in *The Steamer St. Lawrence,* 1 Black 522, said:

> "Certainly no state law can enlarge it, nor can any act of Congress or rule of court make it broader than the judicial power may determine to be its true limits."

And again in *The Lottawanna,* 21 Wall. 558, 575, it is said:

> "The question as to the true limits of maritime law and admiralty jurisdiction is, undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no state law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be."

Finally upon this point it is interesting to note the words of Judge Dooling (who decided the present case) in the case of *The Sinaloa,* 209 Fed. 287, 288, wherein he said, in denying a lien for services of a watchman:

> "The apparent intent of the act was to relieve those persons who formerly would have had a lien if credit had been given to the vessel from the necessity of alleging and proving that credit had been so given. The purpose does not seem to have been to create a new class of liens, or liens for services which had been theretofore determined not to be

> maritime, but only to deal with certain matters that had always been recognized as cognizable in admiralty."

It will be noted also that the statute in question provides only for the giving of a maritime *lien* to be enforced by a proceeding *in rem*. The present libel is not *in rem*, but was brought to procure a decree *in personam*. The statute does not undertake to give a shipyard owner the right to such a decree; in fact, Section 4 of the Act provides that it shall not be construed to affect the *existing* rules of law in regard to the right to proceed *in personam*.

IV.

Conclusion.

The contract involved in this case is one for nothing more or less than the use of a marine railway, shipyard and equipment. The testimony of the parties contained in the record forecloses any other construction. As such it does not relate to "navigation, business or commerce of the sea".

The subject-matter of a contract is the test for determining whether or not admiralty has jurisdiction. Subject-matter must not be confused with the object of a contract, nor must the old single test of location be entirely disregarded.

Under the subject-matter test as so limited, admiralty has no jurisdiction of the present case for two reasons, first because the repairs to the vessel were made wholly upon land in a shipyard

in no sense a part of the sea, and second, because the repairs were made solely by appellant, the libelant only furnishing the plant. In other words, the claim of libelant is merely for charges for the use and occupation of its marine railway and shipyard, a subject which under the decision in the *The Robert W. Parsons*, is not within the admiralty jurisdiction.

The Act of Congress of 1910 does not purport to give jurisdiction in this case. If such were its purpose the attempt would be nugatory.

An extension of admiralty jurisdiction to cases of the present nature would constitute an unwarranted invasion of the field of ordinary contracts and result in a denial to litigants of the right of trial by jury and other incidents of common law procedure which are jealously guarded by the federal constitution and the constitution of the several states.

It is respectfully submitted that the decree of the District Court must be reversed and the cause remanded with instructions to that court to vacate its decree and to dismiss the libel.

Dated, San Francisco,
March 28, 1918.

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